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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO ZAMBRANO,

Defendant and Appellant.

2d Crim. No. B188957
(Super. Ct. No. BA283014)
(Los Angeles County)

Armando Zambrano appeals his conviction by jury of one count of sale/transportation/offer to sell heroin. (Health & Saf. Code, § 11352, subd. (a).) Zambrano admitted he had suffered two prior convictions (*id.*, § 11370.2, subd. (a)) and had served five prior prison terms (Pen. Code, § 667.5, subd. (b)). The trial court sentenced him to four years in state prison for the violation of Health and Safety Code section 11352, subdivision (a); imposed and stayed a three-year sentence in state prison for each of the two prior convictions (*id.*, § 11370.2, subd. (a)); and struck his prior prison terms (Pen. Code, § 667.5, subd. (b)). Zambrano contends that the trial court abused its discretion when it found that a police surveillance location was protected from disclosure by the official information privilege (Evid. Code, § 1040) and when it denied his motion to represent himself. We disagree and affirm.

PROCEDURAL AND FACTUAL BACKGROUND

On the afternoon of May 4, 2005, Officers Salvador Reyes and Alex Pozo watched through binoculars from an undisclosed observation post while Zambrano stood on a street corner. The officers saw a man, later identified as Mr. Ward, approach Zambrano and give him some one dollar bills. They saw Zambrano spit a yellow balloon into Ward's right hand. Reyes radioed a patrol officer, who detained Zambrano. Zambrano had \$191 in cash in his pants pocket, including 16 singles. Another patrol officer followed and detained Ward. Ward had a yellow balloon containing 0.13 net grams of heroin in his right hand. The heroin had a street value of \$4 to \$7.

Officer Reyes was the prosecution's first witness. The court allowed him to withhold the exact location of the observation post. The trial court determined, after an in camera hearing, that the exact location was protected by the official information privilege and was not material to Zambrano's defense. (Evid. Code, § 1040.) Defense counsel was allowed to ask about the officers' specific view of Zambrano; their distance from him; their elevation above him; whether the observation post was static or moving; and whether any objects, landscaping, bus stops, traffic or pedestrians might have obstructed their view.

After Officer Reyes' direct testimony, Zambrano moved to proceed in pro. per. Zambrano asked to "[j]ust take over from this point on because [he knew] exactly what happened on that date. And [he] could explain better [himself]." The trial court denied the request as untimely.

Zambrano testified. He denied selling drugs to Ward. Zambrano testified that in the days before his arrest, he had come to Los Angeles from Las Vegas to help a homicide investigator locate a witness. He testified that when he was trying to leave Los Angeles, he had a car accident, breaking bones and dislocating his shoulder. When he was discharged from the hospital, he went to a street corner to buy drugs to help with his pain in preparation for a bus ride back to Las Vegas. He testified that as he stood on the street corner, a man (Ward) approached and helped him light a cigarette. Zambrano asked Ward where he could buy pain pills. Ward pointed to a man who would sell him

Darvocet if he waited near Taco Bell. Zambrano testified that he walked toward Taco Bell, and police suddenly grabbed him. He explained that he had cash because his mother had wired him \$300 to help him get back to Las Vegas. The parties stipulated that Zambrano did receive a \$300 wire transfer the day before his arrest. A Los Angeles homicide detective testified that Zambrano had provided her with some information about the location of a material witness to a homicide, but that she had not asked him to come to Los Angeles to help locate the witness.

DISCUSSION

Official Information Privilege

Evidence Code section 1040, subdivision (b)(2) provides a conditional privilege against disclosure of official information where "[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." Generally, the party claiming the privilege must either show in open court why the matter is privileged, or explain why doing so would compromise the privilege. If explanation in open court would compromise the privilege, the court may conduct an in camera hearing pursuant to Evidence Code section 915, subdivision (b) to consider the claim of privilege. (*Torres v. Superior Court* (2000) 80 Cal.App.4th 867, 873.) Before upholding the privilege, the trial court must also provide the defendant an opportunity to demonstrate a need for the information that may outweigh the public interest in nondisclosure. (*Id.* at p. 874.)

If, after weighing the competing interests, a trial court upholds the privilege, and "the trial court determines that the location is material [to the defense], the testimony of the officer should be stricken [citation] or an adverse evidentiary finding must be made pursuant to [Evidence Code] section 1042, subdivision (a)." (*People v. Walker* (1991) 230 Cal.App.3d 230, 237.) It is defendant's burden to demonstrate materiality. On appeal, Zambrano has the "burden of showing that in view of the evidence, there was a reasonable possibility that the location could constitute material evidence on the issue of guilt which would result in his exoneration." (*Id.* at p. 238.)

We first determine that the trial court in this case did not err by conducting an in camera hearing without a prior showing by the prosecution. The initial showing for an in camera hearing is only required if it is not self-evident that the information is covered by the privilege. (*Torres v. Superior Court*, *supra*, 80 Cal.App.4th 867, 873.) An example of a circumstance where the privilege is "self-evident, or nearly so" is an undisclosed police surveillance post. (*Ibid.*; *People v. Walker*, *supra*, 230 Cal.App.3d 230, 235.)

At the in camera hearing, the prosecution demonstrated a public interest in nondisclosure to the satisfaction of the trial court. Zambrano's counsel made no showing of necessity in response.

On appeal, Zambrano argues that nondisclosure denied him an independent means of verifying the officers' observations, and that the exact location of the post was material to his defense. In *People v. Garza* (1995) 32 Cal.App.4th 148, the court held that the exact location of a surveillance location was not material and rejected the defendant's claim that counsel was ineffective for failing to move for disclosure. The officer in *Garza* watched the defendant engage in a drug transaction from the surveillance post. The officer used a two-way radio to communicate with other officers and was able to accurately describe the defendant and monitor the defendant's activities. The *Garza* court observed that this would not have been possible if the officer's view were obstructed. (*Id.* at p. 155.) It was therefore not reasonably possible that disclosure of the exact surveillance location would have resulted in the defendant's exoneration of charges arising from the drug transaction.

Like the officer in *Garza*, Officers Reyes and Pozo made observations that would not have been possible if their views were obstructed. Reyes used a two-way radio to communicate his descriptions of Zambrano and Ward to patrol officers. Reyes described Zambrano as a male Hispanic wearing a blue sweater and dark pants with his right arm in a sling. A responding patrol officer found Zambrano walking in the location identified by Reyes, matching the description given by Reyes. Reyes described Ward over the radio as a black man wearing a striped shirt and glasses. A responding patrol

officer found Ward 40 to 60 feet from where the transaction had just occurred, matching Reyes' description. Reyes watched from the post as the patrol officer arrested Ward. It is not reasonably possible that disclosure of the exact location of the observation post would have resulted in Zambrano's exoneration.

In *People v. Walker, supra*, 230 Cal.App.3d 230, the trial court did not abuse its discretion when it refused to strike an officer's testimony about a drug transaction that he observed from an undisclosed surveillance location. The exact location in *Walker* was not material, because the officer testified that he was about 15 feet away with an unobstructed view of the exchange of cash and a small object. "Defendant made no attempt to demonstrate a need for the evidence or that alternative means for obtaining the evidence if needed were not available. Defendant did not prove or even offer evidence to indicate that there was some point within the 15 feet to the rear of the building that the officer could not have observed him due to an obstruction." (*Id.* at p. 238.)

Here, Officers Reyes and Pozo testified that their surveillance location was about 60 feet away from the corner where Zambrano stood. They both testified that the location was elevated. They looked down on Zambrano with binoculars through an open window. They testified that the day was clear and their view was unobstructed. Reyes and Pozo were shown a defense photograph depicting construction scaffolding in the area. They each testified that no construction scaffolding was in place on the day of Zambrano's arrest. Like the defendant in *Walker*, Zambrano did not make a showing of necessity for the exact location of the post and did not demonstrate that any elevated open window within 60 feet from the street corner would have afforded an obstructed view.

As the *Walker* court observed, hidden observation posts are useful law enforcement tools as long as they remain secret, but disclosure destroys the future value of the location and may threaten the safety of officers using the post as well as the occupants of the building or those who have cooperated in its use. (*People v. Walker, supra*, 230 Cal.App.3d 230, 235.) This surveillance post was in an area controlled by a gang, a fact that weighs in favor of nondisclosure. (*Id.* at p. 236.) In the absence of

necessity for disclosure, the trial court did not err in upholding the privilege and was not required to strike the officer's testimony.

Self-Representation

A defendant has a federal constitutional right to self-representation. (*Faretta v. California* (1975) 422 U.S. 806.) In order to invoke the unconditional right to self-representation, the defendant must assert the right within a reasonable period of time before commencement of trial. (*People v. Burton* (1989) 48 Cal.3d 843, 852.) Zambrano did not move to represent himself until after trial had commenced and the first witness had testified.

A *Faretta* motion made after commencement of trial is addressed to the broad discretion of the trial court. (*People v. Hardy* (1992) 2 Cal.4th 86, 196.) When a mid-trial request is made, the trial court must "inquire *sua sponte* into the specific factors underlying the request," considering "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*People v. Windham* (1977) 19 Cal.3d 121, 128.) The inquiry is mandatory. "When such a midtrial request for self-representation is presented the trial court shall inquire *sua sponte* into the specific factors underlying the request thereby ensuring a meaningful record in the event that appellate review is later required." (*Ibid.*)

Here, the trial court denied the motion on the ground that it was untimely, and did not inquire into the *Windham* factors. The court stated, "We are right in the middle of a jury trial. All of a sudden now? [¶] The pro per request is denied. But it's been made. But it's not timely. We are right in the middle of a jury trial. [¶] . . . [¶] . . . And so if he had made it earlier, I would have considered it. If there was no time waiver, nothing that I would have to do. But right now, no."

The record does contain support for denial based on each of the *Windham* factors. Where the trial court fails to inquire into the *Windham* factors, but "the reasons for the denial of the motion are absolutely clear on the record . . . there will be no

detrimental effect on the justice system for the appellate court to draw the inferences necessarily implied by the court's ruling." (*People v. Perez* (1992) 4 Cal.App.4th 893, 905, fn. 10.)

In *People v. Perez*, *supra*, 4 Cal.App.4th 893, the trial court refused to entertain a *Faretta* motion that was made on the first day of trial. The trial court denied it as untimely without inquiry. (*Id.* at p. 902.) Having found the motion untimely, the trial court, "was required to follow the procedure mandated in *Windham*, by inquiring sua sponte regarding the reasons underlying Perez's request to represent himself." (*Id.* at p. 904.) Nevertheless, the reviewing court found no abuse of discretion. "While the court did not specifically make such inquiry, we conclude there were sufficient reasons on the record for the court to exercise its discretion to deny the request." (*Ibid.*) The record supported the implied finding that the motion was merely a device to disrupt trial. (*Id.* at pp. 904-905.) The trial court was aware of the quality of representation based on denial of a motion made the previous day pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. The trial court was aware of defendant's proclivity to substitute counsel given his three prior *Marsden* motions. Trial was about to commence, and defendant was not ready to proceed.

In this case, the trial court was also aware of the quality of representation based on a *Marsden* hearing conducted two days before Zambrano's *Faretta* motion. Zambrano had demonstrated some proclivity to substitute counsel with his *Marsden* motion. The only reason Zambrano gave for the mid-trial request to represent himself was that he knew "exactly what happened on that date" and he "could explain it better" himself. When Zambrano made the request to represent himself, the jury had been sworn, witnesses were under subpoena, and the first witness had given his direct testimony. Zambrano gave no reason for his delay. He did not request a continuance, but the court was well within its discretion to determine that disruption and delay would have resulted if the request had been granted.

The trial court expressed concern with trial disruption, stating, "But here, this matter has been set, prepared for trial. Witnesses have been called. And now, right

in the middle of the examination of a witness, witness is still subject to cross-examination by counsel." It is within the trial court's sound discretion to protect against frustration of the orderly administration of justice. (*People v. Windham*, *supra*, 19 Cal.3d 121, 129, fn. 5.) The trial court did fail to conduct the required *Windham* inquiry, but sufficient reasons appear in the record for us to conclude there was no abuse of discretion here.

Even if the court erred in denying the *Faretta* motion, the judgment would not be reversed. We review erroneous denial of an untimely *Faretta* motion for harmless error. (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050.) The eyewitness testimony of Officers Reyes and Pozo was corroborated by physical evidence in the possession of Zambrano and Ward immediately after the transaction occurred. It is not reasonably probable that a result more favorable to Zambrano would have been reached in the absence of any error.

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Michael K. Kellogg, Judge
Superior Court County of Los Angeles

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